IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-902

VOLKSWAGENWERK AKTIENGESELLSCHAFT, VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN PRODUCTS CORPORATION and VOLKSWAGEN SOUTH CENTRAL DISTRIBUTOR, INC.,

*Petitioners,*

*v.*

HEATRANSFER CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

In an effort to divert the Court's attention from the importance—which is not denied—of the antitrust questions presented, the brief in opposition portrays this case as one where a jury found misuse by an automobile company of its economic power to coerce its franchisees, to the injury of small competing suppliers like respondent. In fact, there was no such jury finding. All the jury found was that as a result of enforcement of Volkswagen's "best efforts" clause in accordance with its terms, the marketing opportunities for competing air conditioning manufacturers were lessened; that by acquiring its own air conditioning supplier, Volkswagen had foreclosed itself as a customer; and

that it enjoyed a very large share of a "market" limited to air conditioners installed in its own automobiles. Had misconduct of the sort traditionally condemned under the antitrust laws been found by the jury, the court below would not have had to extend the *per se* doctrine. Nor would it have had to lay down new law declaring "foreclosure" and not "coercion" to be the test for an illegal tie-in where the plaintiff is a competing supplier rather than a franchisee.

The case in this Court does not turn on disputed issues of fact. Rather, we contend that the court of appeals applied clearly erroneous rules of law in upholding the judgment in respondent's favor. The brief in opposition does not negate these legal errors; and only one of its points, the first, and least substantial, is even addressed to the "cert-worthiness" of the issues presented.

*Alternative Grounds.* Respondent's argument that the judgment is supported by alternative unchallenged findings of liability is so frivolous that the court of appeals did not even mention it. The jury did not assess damages separately with regard to each of the violations that it found. Hence, if any of the findings of violation is set aside, the entire judgment must be reversed because there is no way of knowing how much of the total damage award the jury may have attributed to such violation.[1] *Sunkist* v. *Winckler*

[1] In any event, the findings are interrelated, not independent. The jury's finding that the best efforts clause constituted an illegal *per se* tie-in was the basis on which the Fifth Circuit sustained the findings of a Section 1 conspiracy to restrain trade and of Section 2 monopolization (Pet. 24a, 29a). The market share issue is common to both the Section 7 and Section 2 charges, and the Section 7 allegations were also put to the jury as elements of the Sections 1 and 2 charges. The damage (*Brunswick*) issue is common to all of the alleged violations since it challenges the only damage theory submitted to the jury.



*& Smith Co.*, 370 U.S. 19 (1962); *Pitchford* v. *Pepi, Inc.*, 531 F.2d 92, 107 (3d Cir. 1976), *cert. denied*, 426 U.S. 935 (1976).

*"Best Efforts" Tie-in Question.* Respondent's entire argument as to whether a best efforts clause is an illegal *per se* tie-in is that the Volkswagen best efforts clause was enforced and that if it had not been enforced the Fifth Circuit would not have deemed it illegal *per se*. We agree. The question presented is whether an *enforced* best efforts clause is illegal *per se*. If, as respondent does not deny, a best efforts clause serves valid business purposes that make it subject to the Rule of Reason and preclude its being classified as an illegal *per se* tie-in, it cannot become illegal *per se* by being enforced, as the court below held.[2]

*Relevant Market.* Only in this Court does respondent question the existence of production interchangeability. It does so without record references (Br. in Opp. 10 n.6) and in the face of undisputed evidence, including its own trial assertions (Pet. 15 n.13), of production interchangeability. At trial respondent conceded, indeed asserted, production interchangeability as the basis for claiming lost profits on air conditioner models that it never manufactured or even designed (Pet. 82a-85a). It is too late for it to argue the contrary.

Respondent's main relevant market argument is that production flexibility is but one of several criteria established by *Brown Shoe Co.* v. *United States*, 370 U.S. 294

[2] With regard to the Fifth Circuit's novel and unprecedented tie-in standard where the plaintiff is a competing supplier, respondent simply denies that the Fifth Circuit has departed from the requirement of "coercion" (Br. in Opp. 8 n.3)—this in the face of that court's unequivocal statement that "the fact of coercion appears less important in this situation [where an independent supplier asserts harm] then the fact of foreclosure" (Pet 22a).

(1962). The *Brown Shoe* guidelines are not a laundry list; this Court has emphasized that they are not to be used mechanically or talismanically to create economically irrational "markets." *United States* v. *Continental Can Co.*, 378 U.S. 441, 449 (1964); see also, *ITT Corp.* v. *GTE Corp.*, 518 F.2d 913, 930 (9th Cir. 1975). That is why the Ninth and Tenth Circuits have held that, where production flexibility is demonstrated, the relevant market must be defined broadly enough to include all products capable of being produced by the same production facilities. These decisions, we submit, represent appropriate clarification of *Brown Shoe;* but if, two circuits have, contrary to the Fifth Circuit in this case, misapplied *Brown Shoe,* review of this issue is all the more warranted.

*Monopoly Power.* No reply is offered to our argument that this Court's decisions do not permit a conclusive presumption of monopoly power to be based on market share statistics.[3] With regard to the bearing of interbrand competition (another fact that respondent conceded below as part of its damage claim (Pet. 17 n.18)), respondent distorts our position. We do not contend that if the automobile industry is competitive, there can be no monopoly of tire production or that if the production of crude oil is competitive there can be no monopoly of the production of oil-field equipment. Of course a tire monopolist could sell tires at a monopoly price to the automobile industry; and so with the sale of oil-field equipment to the petroleum industry. But American Motors Company, a small and competitive producer of automobiles, could not, by acquiring a manufacturer of tires, obtain monopoly profits from the sale of

[3] In another context (see p. 5 *infra*), respondent attempts unsuccessfully to distinguish *General Dynamics* as inapplicable to vertical mergers. The other cases we rely on for this point—*Citizens & Southern* and *Marine Bancorporation*—are not cited or discussed in the brief in opposition.



tires to itself or its franchisees. So too with Volkswagen and air conditioners sold in the Volkswagen "market" (A. 1552-55; 4398-4424). To this contention respondent offers no reply.

*The Acquisitions' Competitive Effects.* Respondent offers not a word in defense of the Fifth Circuit's holding that the Inter-Continental acquisition violated Section 7 (see Pet. 21). Nor does it mention *Citizens & Southern,* which is square authority against holding that the acquisition of a captive supplier, a long-term *de facto* affiliate, such as Delanair, is anticompetitive.[4] As for *General Dynamics* (Pet. 19-20), the principle it enunciates —that market share statistics are not "conclusive indicators of anticompetitive effects" (415 U.S. at 498)—is applicable to any case, horizontal or vertical.

*Failing Company.* The question whether the jury could simultaneously accept respondent's damage assumptions and reject the "failing company" defense is not one of fact, but of law, *i.e.,* the meaning of "failing." Respondent argues that only if its damage model had "assumed Delanair to be out of existence, to have no sales, at the time of acquisition" would it have proved (against itself) the "failing company" defense (Br. in Opp. 15-16). This confuses a "failed" with a "failing" company. The test of a failing company is not nonexistence and no sales at the time of acquisition; it is "the grave probability of a business failure." *International Shoe Co.* v. *FTC,* 280 U.S. 291, 302 (1930). The key assumption of Heatransfer's damage ex-

[4] Pet. 23. Perhaps alluding to the principle of *Citizens & Southern,* the brief in opposition ascribes to a Volkswagen executive an admission "that Delanair's continued poor performance would have required Volkswagen to turn to other suppliers absent the acquisition" (Br. in Opp. 14). In fact, all the witness conceded was the "possibility" that this might have occurred (see A. 4560)—the same kind of "possibility" that *Citizens & Southern* held was insufficient to support a violation of Section 7. 422 U.S. at 122.

pert, the jury and the trial court of a 31 percent annual decline in Delanair's sales, which there was "no reversing" until Delanair "ceases to exist," establishes the grave probability of a business failure (Pet. 22 n.23).[5]

*The Brunswick Issue.* Respondent claims that the difference between *Brunswick* and this case is that in *Brunswick* there was no proof either of injury to competition or of predatory acts, and here there was such proof (Br. in Opp. 19, 17). This attempted distinction is incorrect. Injury to competition was proved in *Brunswick,* as it must be in every Section 7 case; and the Court referred explictly to the possibility that the plaintiffs might have based damages on Brunswick's predatory acts (Pet. 25). The problem in *Brunswick* was that the damages proved were not limited to the consequences of antitrust injury or predatory acts but included loss of anticipated sales because "competitors were continued in business." 429 U.S. at 484. The same is true here. Respondent made no attempt to quantify its damage attributable to foreclosure, tying, or other *antitrust* injury, but as in *Brunswick* sought damages on the basis that, but for the acquisition, the acquired company's sales

[5] To our contention that petitioners were denied the benefit of the "failing company" defense because the jury was erroneously instructed that the petitioners had to prove that the acquired company could not have been reorganized in bankruptcy, respondent answers only that the instruction was "given in the language of this Court in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969)." (Br. in Opp. 15.) We so stated in our petition. The issue we raised, and respondent leaves unanswered, is whether, in light of subsequent decisions, such an instruction—which is completely inconsistent with the purpose of the defense—is sound law.



would have continued to decline to the benefit of respondent.[6]

Respondent seeks to limit *Brunswick* to its specific facts —a merger found unlawful on the basis of the acquiring firm's "deep pocket" or "mere presence" in the market. To the contrary *Brunswick* is applicable whenever a plaintiff bases his substantive antitrust claim on one theory (foreclosure of Volkswagen as a potential customer of Heatransfer) and his damages on another, involving no antitrust injury (the resuscitation of a failing company).

[6] Respondent is incorrect (Br. in Opp. 20 n.11) in arguing that petitioners had to prove that all of Delanair's revival was due to lawful product and service improvements, such as moving the condenser or broadening the product line. Under *Brunswick,* the burden was on Heatransfer to show what portion of Delanair's gain (or Heatransfer's loss) was attributable to anticompetitive conduct as distinct from lawful product and service improvements, which are procompetitive. Respondent cannot be serious in suggesting that its failure to prove damages which would satisfy *Brunswick* spared petitioners from a damage judgment greater than $15 million.

We have no quarrel with the *Bigelow* decision (Br. in Opp. 19) which involved no inconsistency between the plaintiff's liability and damage theories.

## Conclusion

The brief in opposition confirms the presence in this case of important antitrust issues that are fully ripe for review. The petition for certiorari should be granted.

Respectfully submitted,

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